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ABSTRACT

The problem of change in the character of the United States Supreme Court between 1969 and 1975 is examined, in this paper, in the context of group decision making and organizational communication. Based on information from "The Brethren," a behind-the-scenes account of the Supreme Court justices by Bob Woodward and Scott Armstrong, the paper points out that with the breaking of norms of procedure by someone in a position of power (most often Chief Justice Warren Burger), the problem of change in the Court's character became exacerbated, taking on the characteristics of an internal crisis. The analysis of selected Supreme Court cases indicates that the breaking of procedural norms coupled with the Court's norms of conflict management created a dilemma for the Court that resulted in the evolution of cumbersome and time-consuming alternative procedures to assure the quality of the Court's work. (RL)

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THE BRETHREN: A CASE STUDY

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THE BRETHREN: A CASE STUDY

When a small group becomes a sacred institution for a society, the myths surrounding it often prevent critical examination of its internal dynamics. With the publication of The Brethren: Inside the Supreme Court by Bob Woodward and Scott Armstrong, the public was given a description of the internal dynamics of the United States Supreme Court.[1] The Brethren provides students of political science, the legal system, small group behavior, and other disciplines the opportunity to study the Supreme Court in a limited manner.[2] Our analysis of the Supreme Court as a small group focuses on its ability to manage conflict and regulate norm-breaking behavior. This study is based upon the emergent model of small group communication which argues that the culture of a group emerges from group interaction and communication, both of which contribute to the development of norms, roles, and the group's self-perception. The emergent group culture is unique, and distinguishes each group from any other group. This model of small group behavior is based upon the study of zero-history, leaderless small groups.[3] Although the Supreme Court is not a zero-history group and perhaps not a leaderless small group during the time period described by Woodward and Armstrong, the extent of internal change indicates that roles, (including leadership), norms, and the culture or character of the Court were in flux.

When the 1969 term of the United States Supreme Court convened, Warren E. Burger, the new Chief Justice, began his tenure on the Court by joining a group of men who had worked together from two to thirty years. During the next seven years, the composition of the Court

changed drastically, integrating five new Justices in the space of seven terms. Of these, only three terms were stable in membership. This period of transition is not significant simply because of the loss of members and the arrival of new Justices, but because of the significance of the loss symbolically. The changes included the retirement of the last two Justices appointed by Franklin Roosevelt, Justices Black and Douglas, and the Chief Justice who had symbolized the Court for the past fifteen years, Earl Warren. The change in membership between 1969 and 1975 indicates that the Court was undergoing a renegotiation of roles and relationships, and was also potentially renegotiating the character of the Court, a process that could dramatically affect the content of future Court decisions. In 1969 it was apparent that the extent of change on the Court could go beyond the appointments of Chief Justice Warren Burger and a replacement for Abe Fortas. Three more Supreme Court appointments were distinct possibilities in the next three years, for Justices Hugo Black, John Harlan and William O. Douglas were at least seventy years of age. If Richard Nixon could appoint the next three Justices to the Court, its character most probably would become more conservative.

The expected change in the character of the Court conceivably could strain the legal principle of stare decisis, that decisions should abide by precedent.[4] Woodward and Armstrong's depiction of the Court indicates that stare decisis is an important principle for the Justices, because adherence to it is seen as necessary for maintaining the credibility of the Court in the legal community.[5] Adherence to stare decisis demonstrates that the Court, as final arbiter of disputes, does not succumb to short-lived political change,

but that its decisions pass the test of time. With as many as five Nixon appointees to the Court a real possibility in 1969, a conservative change in the Court's composition would be likely. If the conservative minority under Chief Justice Warren became the conservative majority under Chief Justice Burger, there would be the potential for significant reinterpretation of law which in turn might threaten stare decisis and the Court's credibility. Most importantly, if Court decisions did not contain careful legal reasoning, stare decisis would appear to be overlooked or ignored, further calling into question the Court's ability to do its job.

The problem of change in the character of the Court described above was underlying, but in itself was not of sufficient magnitude to be a major contributor to the internal problems described in The Brethren. Rather, with the breaking of norms of procudure by someone in a position of power (most often Warren Burger), the problem of change in the Court's character became exacerbated, taking on the characteristics of an internal crisis. The magnitude of procedural norm-breaking threatened the guidelines and standards of interaction which facilitate the debate, argument, and information transmission seen as necessary for the writing of carefully reasoned legal decisions consistent with precedent and the Constitution. Whether the continuous breaking of procedural norms would contribute to the writing of poor quality legal decisions was a critical issue facing the Court. This group thus faced a crisis externally in maintaining its credibility in the legal and political community on the basis of its work, and internally in maintaining working relationships and procedures which would facilitate accomplishment of the highest quality task with the least unnecessary strain upon its members. Our analysis indicates

that the breaking of procedural norms coupled with the Court's norms of conflict management created a dilemma for the Court which resulted in the evolution of cumbersome and time-consuming alternative procedures to assure the quality of the Court's work.

There were two major areas of conflict within this group: those over actual legal issues, the substance of the law and the reasoning behind the legal decisions, and those over the procedures necessary to do the substantive work. We term the former content or substantive areas, and the latter procedural. Our analysis of the Court's interaction as depicted in The Brethren indicates that the Court's norms of procedure generally provide effective means for managing conflict over the content of the Court's decisions. The norms of procedure which characterize this group are designed to deal with the almost continual conflict over substantive issues. In order to fully understand the impact of behaving outside of these norms, our analysis first examines the structure of the procedural communication norms associated with conflict management.

An emphasis on conflict over content should be expected, given the Court's role as final arbiter in an adversarial system which requires the clash of ideas and recognition of differences of opinion on substantive issues. The Court's procedural norms facilitate the resolution of differences through arriving at consensus or through implicitly agreeing to disagree by writing majority decisions with the minority option of publishing a dissent or a concurrence (in which case one might agree in part with the outcome but indicate relevant differences in opinion). One would expect the conflict over the content of decisions to be tension-producing, even to the point of interfering with the

deciding of cases.

Some content debate occurs in conference; however, a great deal of it appears to occur outside of this meeting using several different communication channels.[6] The conference is a closed meeting in which the Justices discuss a case and take an initial vote on its legal merits. Based upon this vote the most senior Justice in the majority assigns the writing of decisions. If the Chief Justice is in the majority, he assigns the case because he is considered the most senior Justice by virtue of position.[7] These norms of procedure help resolve the issue of who should have the power to assign the writing of decisions, for through the assignment process the senior Justice in the majority has some control over the nature of the legal reasoning behind the decision. For example, by assigning a decision to a Justice who is reluctant to make major changes in interpretation of the Constitution, the senior Justice may try to insure that the decision the Court issues is a narrow interpretation of the Constitution minimizing its impact on legal precedent. The control over legal reasoning greatly increases if the senior Justice assigns the case to himself. The power of assignment also is important for the relationships between Justices, for the assigning Justice determines the types of cases upon which his colleagues will write (for example, legally complex, interesting, "pee-wees," or boring). As one would expect, the senior Justice is expected to assign the writing of a decision to a member of the majority, a generally unspoken norm.

Outside of conference there are also norms of procedure which aid

in the management of conflict over content. Woodward and Armstrong depict the Justice's behavior outside of conference as characterized by indirection through which Justices minimize face-to-face confrontation. Use of the informal network of law clerks appears to be one way in which Justices gather information about the current position of another Justice on a particular case, or as a way to informally send out information to another's chambers.[8] The norm of using clerks to communicate with other Justices' chambers extends to negotiation of the content of decisions. For example, in the Charlotte busing case a clerk of Justice Marshall negotiated with a clerk of Chief Justice Burger to move a discussion of residential segregation from a footnote to the main body of the decision, giving it more importance.[9] This norm allows the Justices to use intermediaries and, thus, minimize face-to-face confrontations in an environment which continuously requires that the Justices confront each other in some manner. The use of an indirect channel of communication, the informal network of law clerks, allows the Justices to minimize some of the tension which accompanies confrontation. It also serves as a face-saving mechanism when a Justice modifies his previous legal stance to accomodate the concerns of another.

The Justices employ another indirect, though formal, channel of communication in their confrontations over content: the writing of memos. A Justice who is assigned to write a majority decision circulates a draft decision to which each Justice may respond with a memo to join the decision, concur in the result, or dissent from the decision. Often the circulation of a draft decision indicates that a round of

negotiation between Justices will begin.[10] Because written decisions require more specific arguments than those to which the original majority responded during conference, a Justice in the majority may propose changes which are necessary to retain his vote. If this is not communicated through law clerks it may be written in a memo. Such changes often appear in a memo proposing minor changes; this may provide a means for ultimately proposing substantial changes in the decision or even proposing an alternative draft of the decision, as were memos in abortion and obscenity cases.[11] By sending a memo indicating a desire to join a decision if "a few changes are made" or sending a memo couched in terms of "making a few suggestions," a Justice may hope to address substantial substantive differences while increasing tensions related to the task as little as possible. If substantial change is proposed in such a memo, the Justice may avoid the appearance of attempting to steal a majority decision from another Justice. The indirect nature of the memo allows the Justice who receives it to ignore it, further negotiate content changes without confronting the disagreeing Justice, or accept the alternative reasoning without admitting that his original reasoning was inadequate, inappropriate, or even shoddy.

Memos to dissent from a majority decision can be a powerful vehicle for indirect negotiation of content. Justices can change votes from the majority to minority or vice versa once drafts are circulated.[12] Dissents have the potential to become majority decisions, especially if votes in conference were tentative.

In addition, the circulation of research memos provides an

indirect procedure for addressing substantive differences. Circulating research memos before oral arguments and conference enables a Justice to focus the attention of his colleagues on the issues he considers important.[13] A Justice may even submit an alternative draft of a majority decision in a research memo after conference, as Stewart did in the Charlotte desegregation case, which once again enables the submission of alternative reasoning with the minimum of challenge to the assigned author of the opinion.[14] Research memos and memos making "a few suggestions" provide a procedure allowing Justices to engage in substantive conflict without formally admitting that their substantive positions greatly differ. These procedures may serve to enhance the chances of achieving consensus on a majority decision, which would set stronger legal precedent than several concurring decisions based upon differing legal reasoning.

Occasionally, Justices were confrontive and proposed alternative drafts of decisions as alternative drafts.[15] As portrayed by Woodward and Armstrong, this was not a frequent occurrence on the Court. Outside of conference Justices sometimes attempted to deal with conflict over the content of decisons in a face-to-face manner. This tendency was tempered, however, by the preferences of some of the Justices not to be perceived as lobbying or pressuring other Justices.[16] The text indicates that some Justices were concerned that such lobbying would be considered an attempt to form a coalition with other Justices, or that they would be seen as being unduly influenced by other members of the Court.[17]

The norms of procedure which had evolved to enable the members of the Court to effectively manage the inevitable conflicts over the content of decisions were, at the same time, ill-suited for dealing with the conflict over the breaking of the procedural norms themselves. The Court faced precisely such a dilemma, as portrayed in The Brethren, when confronted with procedures enacted by the new Chief Justice, Warren Burger, who consistently did not conform to the Court's norms of procedure.

Early in the time period covered in this text there is some evidence of direct and open conflict over procedure between members who had been on the Court for years together. For example, Justices Harlan and Black, arguing about a delay in an opinion, are described as walking out of conference "arm in arm, gently arguing as they headed down the hall."[18] Few conflicts follow this pattern, however, particularly when a Justice was in disagreement with the new Chief's procedures. According to Woodward and Armstrong, Justices "did not wish to lecture the Chief," or were not ready to confront him. Justices might be disturbed or upset, but they said little.[19] Justice Douglas was known for his explosive confrontations, but they were also indirect in that they occurred after a period in which he was silent regarding the procedure at issue. They then appeared in the form of a threatened dissent, a content arena. Douglas seldom received support from other Justices for the positions taken in his acerbic memos, with the result that his attempts to address the procedural issue seldom succeeded.[20]

When Burger prepared to begin his first term on the Supreme Court, he quickly made several administrative and procedural decisions

which did not overtly affect the task of the Justices, but which asserted his administrative authority. As the year progressed, the procedures which created the greatest difficulty in relationship to the accomplishment of the task were those regarding the assigning and writing of the majority opinion. Throughout the time period studied, it appeared that Burger would increasingly withhold his vote or change his vote in conference, giving him the power of assignment by placing him in the majority. For example, he is described as pleading ignorance and withholding his vote until finding which way the conference was leaning, in order to vote with the majority. He is also portrayed as switching his vote, or mistakenly remembering the votes of others when making assignments.[21] He even is shown as assigning the case to a member of the minority because he didn't think there was much difference between the minority and majority positions, or as taking the opinion for himself in order to put "a little something for everyone" in the opinion despite widely divergent views.[22] In and of itself, the issue of procedures for assigning cases might not have been a major problem for the members of the Court. It became a crisis, however, when accompanied by two additional concerns. First, when Burger assigned an important opinion to himself, Woodward and Armstrong indicate that early circulations of his opinions often contained questionable legal reasoning, or little consideration for the principles of stare decisis, occurrences which led clerks and other Justices to question his competence.[23] Second, Burger is consistently portrayed as attempting to control assignments while simultaneously denying or ignoring the substantive disagreements between Justices regarding the outcome of

the decision or the legal reasoning upon which the opinion should be based. Burger's failure to either recognize or acknowledge major differences between himself and other members of the majority further called into question his competence and his motives.[24] Our analysis indicates that given the context of norms for conflict management characterized by indirection, conflicts over procedures could not be adequately addressed. Furthermore, the denial of substantive disagreements effectively closed the one avenue by which conflict had been managed, an avenue which the Justices consistently attempted to re-open.

In response to persistent misassignments or to circulations from Burger of dubious quality, the Justices focused on content. The substance of the decisions handed down by the Supreme Court is of course an overriding consideration, and it is ironic that by focusing upon the content of the decisions it became increasingly difficult to come to a satisfactory resolution of content differences. Content disagreements coupled with procedural norm breaking increased the difficulty of resolving content differences. In fact, content disagreements were eventually resolved only through the evolution of alternative procedures. Throughout much of the text, however, Justices did not focus upon the procedural problems. Persistent misassignments by Burger were overlooked, and it came to be expected and uncomfortably accepted that Burger would withhold or switch his vote, assuring his place in the majority, allowing him to control the assignment of cases, hence inhibiting the resolution of content differences. Justices continued to circulate memos and suggestions, couching them in terms which would not be construed as attempts to "steal" the majority or to challenge Burger's authority or competence, but the indirect nature of such memos did not require Burger's response. He could therefore

continue to ignore or deny substantive disagreement, to the frustration of the Associate Justices. In addition, the alternative channel for resolution of content differences, the clerks, was cut off by Burger's attempt to remove his clerks from the informal clerk network.[25] With channels blocked for addressing content concerns because of the procedures enacted, and Burger's minimal response to normative channels for conflict resolution, the tried-and-true norms for dealing with content differences could not work. It became increasingly difficult for the Associate Justices to get substantive concerns addressed because the procedural conflicts lay untouched.[26]

Not only did breaking procedural norms emphasize the difficulties normally associated with content disagreements, the changing character of the Court and the decisions reflecting that character emphasized the importance of the content issues at stake. The older members of a more liberal Court were sensitized to the content disagreements, making the lack of avenues for expressing disagreement that much more frustrating. Once Burger began breaking procedural norms consistently so that he appeared to be attempting to control the content of the opinions coming from the Court, his actions seemed to coincide and reaffirm the expectations of change in the character of the Court by virtue of the addition of the Nixon appointees.[27] This in turn exacerbated the problems caused by the breaking of procedural norms. The issue of norm breaking was not a crisis just for the remaining Justices with a liberal orientation, however; it was also a concern for those in the center of the Court and for all the remaining Justices when there was a danger that an opinion might be an embarrassment to the Court. The problems came to the forefront and reached crisis proportions when a decision

facing the Court needed to be unanimous (in order to increase the legitimacy and power of the decision when there was anticipated public or political resistance to the decision outcome), when the case being decided was one over which there was high public interest, or when the outcome of the decision was likely to have great social impact (e.g., abortion, busing, the death penalty, freedom of expression, or Watergate tapes).

The Charlotte busing case, argued during the 1970 term, is illustrative of the interaction between content and procedural matters. In this case, Burger immediately emphasized procedural issues in conference while stating his desire to maintain unanimity on the opinion. In an apparent effort to achieve that end, he suggested putting off preliminary voting on the case and took the opinion to write himself in order to attempt to accomodate widely divergent opinions. In doing so, he failed to address the substantive differences between the Justices both as to the outcome of the decision and the reasoning to be used in the written opinion.[28] His draft opinion dealt with few of the concerns raised by the other Justices in conference. The response of the other Justices was confused. Five of the Justices did not like the draft. Stewart carefully recommended suggestions in a memo, to avoid "threatening" the Chief.[29] Brennan encouraged Stewart; Douglas and Marshall also backed Stewart behind the scenes, with the hope of gaining "some leverage" with Burger.[30] The coalition behind Stewart finally forced recognition of content concerns, based upon the threat of not joining the opinion.[31] After several varied efforts by the Associate Justices, Burger eventually incorporated language to address the content concerns brought up by the other members of the Court, later denying that the

opinion had changed in either outcome or reasoning. Burger on the one hand appeared to attempt to accommodate differences of opinion, but his communication style which indicated a denial of substantive differences made actual accomodation an unlikely outcome.

When faced with a combination of Burger's denial or ignoring of content differences, other Justices turned toward a communication strategy designed to build underground coalitions which enhanced "join" power, diffusing the responsibility for challenging the Chief and providing a way to minimize the alienation of other Justices caused by breaking the vague norm discouraging coalition formation. Nevertheless, by focusing on the content of the decision, the procedural issues lay unresolved. Just as Burger avoided or denied substantive disagreements by changing or controlling procedure, the other Justices avoided procedural disagreements by focusing on the substantive. The grounds for resolution of either problem were seldom clear. It became a situation of group members unwittingly amplifying the behaviors each found unacceptable in the other: the more Burger appeared to attempt to control procedures, the more the others utilized the norm of indirection in the content area, the more likely that Burger would misinterpret the indirect suggestions and appear to control procedure.

Burger often appeared to be at the center of conflict in this group, but is must be recognized that he gained at least some support from others for his procedural actions. Justices accepted his misassignments, for example.[32] By maintaining the focus on content and addressing the procedural conflict only indirectly through content, Justices implicitly accepted the procedures Burger enacted. The group's failure to support an individual's attempt to deal with procedure at all (e.g., Douglas'

early attempts), gave support to the procedures as enacted. The norm of indirection in essence reinforced Burger's procedures while placing the brunt of the blame upon him. The expectation was strong that Burger would correctly decipher the indirect expressions of concern; his misinterpretations appeared to be attempts to control rather than a a problem with the norm of indirection. When given an opportunity to openly, directly decide the procedures on a case, the Justices refused to do so, and resorted to behind the scenes attempts to influence content. More direct confrontation was not the answer as long as other members of the Court did not provide explicit support for the Justice involved in the confrontation, for Burger was likely to ignore, deny, or resist expressed concerns, requests, or demands. The Justices viewed themselves as being "forced underground" to try to reach adequate resolution, evolving a strategy of forming coalitions to achieve written opinions which could be accepted by enough Justices to hand down a decision. The Watergate Tapes case is an example of the emerging strategy.

By the 1973 term, the Court had been working together for one full term, and was entering another term of membership stability. During this year's work, the alternative procedure of behind-the-scenes coalition formation clearly emerged, allowing members to address content problems posed by opinions drafted by Burger. The Detroit busing case provided a trial run for this strategy, which was used to full advantage in the Watergate Tapes case. In the Detroit busing case, Burger took the opinion, writing for a majority opinion against city-suburb busing. Burger's draft was unacceptable to the others in the majority because he had "gone too far" and had not adequately

researched the issue.[33] None of the members of the majority joined Burger's majority opinion. Instead, Stewart and Powell "got together." They developed a strategy to "get the Chief to bow to the weight of the Court's center" by trying to gradually force an alternate opinion on Burger, piece by piece. It was an indirect, underground attempt to force capitulation on content, and it worked. The final opinion reflected their attempts.[34] Behind the scenes collaboration appeared to be a successful way to challenge Burger's perceived incompetence, manipulation, or insensitivity.

In the Watergate Tapes case, Brennan attempted to address the procedural issue in a more open fashion. Before conference, he suggested openly and directly to all the Justices a way in which the opinion should be written (a single opinion, written by all, signed by all), obtaining agreement from Douglas, Marshall, Stewart, probably Blackmun and Powell, and perhaps White. Burger was "lukewarm." (Rehnquist had disqualified himself from the case). When the case was brought up in conference, however, Brennan received no support for his suggested procedure, and Burger took the opinion as expected.[35] Almost immediately the underground began work. Upon circulation of the first part of his draft opinion, Burger's work was not seen as adequate. Stewart and Powell went into action, deciding they would have to "work behind the Chief's back."[36] Their strategy: to indirectly get Burger to substitute alternative sections, authored by other Justices, for his own sections. The plan was eventually joined by all the other Justices, and soon Burger was flooded with memos praising the alternatives suggested by other Justices. The very indirectness of this strategy essentially kept Burger from being able to make changes if he wanted to, for seldom was it clear

exactly what was being requested. As he received the memos, Burger had to try to decipher what the others saw as the major content problems. Consistent with his inability or unwillingness to recognize substantive differences, he interpreted the concerns of the others wrongly as concern over a delay in the opinion. When he responded with this interpretation, the others were "angry" that Burger was "missing the point."[37]

During this case, Burger emerged strongly as a scapegoat, with the debate asking, "Was the Chief evil or stupid?"[38] Burger was cast as the root of the problem, others blaming him for the Court's dissension. With the focus on Burger, others could avoid their own contributions to the tension in the group, in part a result of not dealing with procedural problems and of giving only minimal support to attempts to deal with them. By placing the responsibility on Burger because of his perceived incompetence, manipulation, or insensitivity, other members of this group avoided acknowledging their own roles in developing the culture of this group as a whole. In the Watergate Tapes case, Burger took the strategy of ostensibly attempting to accommodate on substantive matters (accompanied by denial of differences of opinion, making it virtually impossible to accommodate), and the other Justices pushed for content changes. The inability of the group to deal with procedural matters led the way to far more complex procedures for resolving the inevitable differences in legal opinion, and therefore to much wasted time and effort.

Burger finally capitulated in the Watergate Tapes case, but felt he had been "sandbagged" into doing so. Nevertheless, he denied that he had capitulated, saying that there had been only "little word

discrepancies" between his opinion and those sections he eventually included which had been formulated by other Justices. His final opinion, he said, did not differ "in substance from the original circulation." Other Justices viewed the changes as avoiding major Constitutional restructuring of Executive and Judicial powers.[39]

The strategy of collaboration to 1) fight procedure and 2) achieve substantive changes appeared enmeshed by the end of the 1975 term. Burger and Brennan continued fighting procedural battles which seemed fruitless, through indirect communications focusing on content; but Stewart and Powell once again choreographed a strategy of utilizing coalition formation to ultimately control the content of decisions. Five cases dealing with capital punishment showed the refinement of the procedure with Stewart, Powell, and the new Justice, John Paul Stevens, collaborating to force a moderate position in all five cases. This time, however, their coalition was not behind-the-scenes. They openly declared their intent to write an alternative opinion (essentially an open attempt to steal the majority). Burger, who had assigned the opinions to White, had little response to their proposal, but White submitted the cases back to the conference for reassignment.[40] The opinions written by Stewart, Powell and Stevens gained majorities on all five cases, although the majority membership differed. The formation of a centrist coalition had once again worked in forcing procedures (regaining control of the assignment) via the substantive, and therefore ultimately dealing with the substantive differences previously neglected.

In attempting to discern the patterns of communication in this group and the reasons for the difficulties the group faced in attempting to resolve its disagreements, we were constantly struck with the

circularity of these patterns. The intermingling of content with procedural matters and the difficulty separating communications regarding content from those pertaining to procedure increases the general confusion. We think that this confusion is one of the reasons the content/procedure issue was so traumatic for this group. In this case, the group had an over-riding concern with the content of its task, that content being the reason for the group's existence. When procedures broke down, there were few appropriate communication norms for developing new procedures, and the Justices continued to utilize old methods for resolution of content differences to deal with the procedural. This led to the irony of the inability to attain resolution of content matters by focusing on content.[41]

Once the procedural communication norms began breaking down, they could no longer function as safeguards for maintaining positive working relationships among the Justices. Stress upon the members of the Court would likely increase if such was the case; Woodward and Armstrong indicate that relationships were indeed strained "to the breaking point,"[42] and that by the end of the 1975 term "internal animosities that had been growing surfaced more openly and more regularly."[43] Burger's procedures combined with his personal manner of dealing with conflict seemed to traumatize the Court. The reactions of the group inadvertently reinforced the behavior seen as destructive, and the Justices seemed almost unable to stop the cycle of increasing tension. These nine men seemed caught in a punishing group where their progress continued to be impeded by unresolved tensions. It was a group in which Douglas' prediction of a "frayed and bitter Court full of needless strains and

quarrels" came true.[44] It is difficult to believe that the task of this group could be accomplished as effectively as it could or should be. It is the ultimate irony for a group of committed, capable, hard-working individuals whose successful completion of task has ramifications nationwide.

ENDNOTES

[1]Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court, N.Y.: Simon and Schuster, 1979. Hereafter, The Brethren.

[2]Any study of the Supreme Court based upon The Brethren is limited because the text is an incomplete record of interaction on the Court. The reader is told little about Justices White and Rehnquist in comparison to Justices Brennan, Burger, Blackmun and Stewart, for example. The findings of this study must be accompanied by an important caveat: the data are undoubtedly biased, at minimum because of the inaccessibility of certain information. Nevertheless, the authors consider the book to be an important source of information in the sense that the data are reflective of one set of perceptions held by persons closely associated with the Supreme Court. It is possible to question whether or not Woodward and Armstrong are accurate chroniclers of the activities and interactions of the Justices during this period. We recognize these problems, but also consider the text an opportunity to study a real group whose decisions greatly affect our society. Furthermore, students of small groups may be able to gain some insight into the problems of communication faced by ongoing groups.

[3]Ernest G. Bormann, Discussion and Group Methods: Theory and Practice, 2nd ed., N.Y.: Harper and Row, 1975, pp. 201-237.

[4]Henry Campbell Black, Black's Law Dictionary, 4th ed., St. Paul, Mn.: West Publishing Co., 1951. Black defines stare decisis as the "[d]octrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same." p. 1577.

[5]see The Brethren, pp. 367; 10; 87; 113; 180.

[6]see ibid, pp. 2-3, for a description of the basic formalized system of Court procedures. Justices generally meet in conference once a week. In this meeting, Justices also decide upon which cases the Court will accept for review.

[7]ibid, pp. 3-4.

[8]e.g., ibid, pp. 28; 252; 377; 411.

[9]ibid, p. 108; see also pp. 119; 191; 252. Negotiating with Burger's chambers via the clerks seemed to be a rare occurrence.

[10]Written memos vary in the degree to which they approach disagreements straightforwardly. Overall, this formal channel seems to us to be serving similar functions as the informal law clerk network: minimizing face-to-face confrontation and the tensions associated with it, and serving as face-saving mechanisms.

[11]The Brethren, pp. 202; 231-233.

[12]e.g., ibid, p. 117.

[13]e.g., ibid, p. 300.

[14]ibid, pp. 104-105.

[15]ibid, pp. 49-52; 63.

[16]e.g., ibid, pp. 57; 121; 225.

[17]e.g., ibid, pp. 106; 296.

[18]ibid, pp. 90-91.

[19]e.g., ibid, pp. 69; 104-105; 257-258; 365.

[20]ibid, pp. 85-86 (where he was successful); 170-172; 179-180; 187-188.

[21]e.g., ibid, pp. 64-66; 170-174; 258; 417-418; 420-421; 423.

[22]ibid, p. 100; see also pp. 196; 373.

[23]e.g., ibid,pp. 72-74; 103-105; 284-285; 315; 374-375.

[24]e.g., ibid, pp. 66; 100; 112; 177; 236; 333; 342-343; 373.

[25]ibid, p. 34-36.

[26]It should be noted that utilization of procedural loopholes and requirements is often a strategy to obtain desired legal results. We are not contending that the breaking of norms was not employed as such a strategy by an advocate for a particular position. We are contending that regardless of motive, the breaking of norms placed undue pressure and strain upon the Court which ultimately made the task of the Court that much more difficult, and Burger's goal of keeping the Court together much less likely to be achieved.

[27]By 1971 Nixon had appointed Warren E. Burger, Harry A. Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist.

[28]The Brethren, p. 103.

[29]ibid, p. 104.

[30]ibid, p. 106.

[31]Gaining a majority by having one's opinion joined by other Justices increased the precedent setting power of one's written opinion. It was thus desireable to have Justices join one's opinion rather than concur in the result with a separate opinion.

[32]e.g., The Brethren, p. 171; 174.

[33]ibid, pp. 284-285.

[34]ibid, p. 285.

[35]ibid, pp. 295-310.

[36]ibid, pp. 314-316.

[37]ibid, pp. 317-320.

[38]see ibid, p. 323.

[39]ibid, pp. 342-343.

[40]ibid, pp. 437-438. White had not been in the original majority on all five decisions, which was one of the reasons to challenge the assignment.

[41]In an analysis of role emergence it could be argued that the formation of coalitions was a response to the lack of support for emergent leadership. Burger's formal leadership did not assure him the position of emergent leader, and the extent to which other Justices rejected or distrusted his procedures may indicate his rejection as an emergent leader. Furthermore, his position of formal leadership may have inhibited support for an alternative emergent leader, and there are indications in the text of such lack of support. This situation would leave a vacuum of leadership, which was filled in times of crisis by a coalition--a form of leadership which could be minimally supported without creating an outright challenge to Burger's leadership. See

e.g., the Watergate Tapes case and Brennan,pp. 309-310; also p. 315: "Burger was abrasive to his colleagues, persistent in ignorance, and, worst of all, intellectually dishonest. 'On ocean liners,' Stewart told his clerks, 'they used to have two captains. One for show, to take the women to dinner. The other to pilot the ship safely. The Chief is the show captain. All we need now is a real captain.' Stewart was convinced that the Chief could never lead them to a safe, dignified opinion befitting one of the most important cases in the Court's history."

[42]ibid, p. 174.

[43]ibid, p. 443.

[44]ibid, p. 180.